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No. 49

IN THE

SUPREME COURT OF THE UNITED STATES

NORMAN C. BERNHARDT,

Petitioner,

v.

POLYGRAPHIC COMPANY OF AMERICA, INC.,

Respondent.

RESPONDENT'S BRIEF

McNamara & Larrow,
209 College St.
Guy M. Page,
Guy M. Page, Jr.
172 College St.
Burlington, Vermont
Attorneys for Respondent

IN THE

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OCTOBER TERM, 1935

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ERRATA TO RESPONDENT'S BRIEF

Respondent apologizes to the court for errors and omissions in its brief on the merits and respectfully requests the Court to note the following changes in the text of Respondent's brief.

Page 6. Add the following paragraph at the conclusion of the text on this page.

"S. 1466. *Effect of judgment and enforcement.*

The judgment so entered has the same force and effect, in all respects as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered."

Page 13. Fourth paragraph, third line, read "Rule 7" instead of "Ritle".

Page 15. Fourth paragraph, last line, read "substantive law" instead of "substantial law".

Page 20. Last paragraph, first word, read "Thus" instead of "This".

Page 26. Second paragraph, fifth line, read "invalidity" instead of "inability".

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PROVISIONS OF THE CONSTITUTION INVOLVED

CONSTITUTION OF THE UNITED STATES

ARTICLE IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State: And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

PROVISIONS OF THE STATUTES INVOLVED

In addition to the provisions of the United States Arbitration Act as quoted in Petitioner's Brief pp. 2-3, the following sections of the New York Arbitration Law (L. 1920, ch. 275; Consol. Laws, ch. 72) as amended into Art. 84 of the New York Civil Practice Act, §§1448-1449 and now in effect are involved in this case:

§1448. *Validity of arbitration contracts or submissions.*

Except as otherwise prescribed in this section, two or more persons may submit to the arbitration of one or more arbitrators any controversy existing between them at the time of the submission, which may be the subject of an action, or they may contract to settle by arbitration a controversy thereafter arising between them and such submission or contract shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. A written submission or provision in a written contract between a labor organization, as defined in subdivision five of section seven hundred one of the labor law, and employer or employers or association or group of employers to settle by arbitration a controversy or controversies existing at the time of submission or thereafter arising between the parties to the contract including but not restricted to controversies dealing with rates of pay, wages, hours of employment or other terms and conditions of employment of any employee or employees of such employer or employees shall likewise be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract, without regard to the justiciable character of such controversy or controversies.

Such submission or contract may include questions arising out of valuations, appraisals or other controversies which may be collateral, incidental, precedent, subsequent to or independent of any issue between the parties.

A controversy cannot be arbitrated, either as prescribed in this article or otherwise, in either of the following cases:

1. Where one of the parties to the controversy is an infant, or a person incompetent to manage his affairs by reason of lunacy, idiocy or habitual drunkenness unless the appropriate court having jurisdiction approve a petition for permission to submit such controversy to arbitration made by the general guardian or guardian ad litem of the infant or by the committee of the incompetent.

2. Where the controversy arises respecting a claim to an estate in real property, in fee or for life.

But where a person capable of entering into a submission or contract has knowingly entered into the same with a person incapable of so doing, as prescribed in subdivision one of this section, the objection on the ground of incapacity can be taken only in behalf of the person so incapacitated.

Subdivision two of this section does not prevent the arbitration of a claim to an estate for years, or other interest for a term of years, or for one year or less, in real property; or a controversy respecting the partition of real property between joint tenants in common; or of a controversy respecting the boundaries of lands or the admeasurement of dower.

§1449. *Form of contract or submission.*

A contract to arbitrate a controversy thereafter arising between the parties must be in writing. Every submission to arbitrate an existing controversy is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent.

§1450. *Remedy in case of default.*

The making of a contract or submission for arbitration described in section fourteen hundred forty-eight, providing for arbitration in this state, shall be deemed a consent of the parties thereto to the jurisdiction of the supreme court of this state to enforce such contract or submission and to enter judgment on an award thereon. A party

aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration, described in such section may petition the supreme court, or a judge thereof, for an order directing that such arbitration proceed in the manner provided for in such contract or submission.

Eight days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner specified in the contract or submission and if no manner be specified therein, then in the manner provided by law for personal service of a summons within or without the state, or substituted service of a summons, or upon satisfactory proof that the party aggrieved has been or will be unable with due diligence to make service in any of the foregoing manners, then such notice shall be served in such manner as the court or judge may direct. The court, or judge thereof, shall hear the parties and upon being satisfied that there is no substantial issue as to the making of the contract or submission or the failure to comply therewith, the court, or the judge thereof, hearing such application, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the contract or submission.

If evidentiary facts be set forth raising a substantial issue as to the making of the contract or submission or the failure to comply therewith, the court, or the judge thereof, shall proceed immediately to the trial thereof. If no jury trial be demanded by either party, the court, or the judge thereof, shall hear and determine such issue. Where such an issue is raised, any party may not later than five days after the service of the order directing a trial of such issue demand a jury trial of such issue, and if such demand be made, the court, or the judge thereof, shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action. When ever an immediate trial is ordered the order therefor shall provide that if the court, or where a jury has been demanded, the jury, find that a written contract providing for arbitration was made or a submission was entered into, as the case may be, and that there was a failure to comply therewith, the parties shall proceed with the arbitration in accordance with the terms of the contract or submission, and said order

shall provide that if the court or jury, as the case may be, find that there was no such contract or submission or failure to comply therewith then the proceeding shall be dismissed.

The procedure herein provided shall be applicable to any motion made under this article in which an issue is raised as to the making of the contract or submission or the failure to comply therewith.

§1451. *Stay of proceedings brought in violation of an arbitration contract or submission.*

If any action or proceeding be brought upon any issue otherwise referable to arbitration under a contract or submission described in section fourteen hundred forty-eight, the supreme court or the court in which such action or proceeding shall be brought, or a judge thereof, upon being satisfied that the issue involved in such action, or proceeding is referable to arbitration under a contract or submission described in section fourteen hundred forty-eight, shall stay all proceedings in the action or proceeding until such arbitration has been had in accordance with the terms of the contract or submission.

§1452. *Provision in case of failure to name arbitrator or umpire.*

If, in the contract for arbitration or in the submission, described in section fourteen hundred forty-eight, provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method is provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or for any reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then, upon application by either party to the controversy, the supreme court or a judge thereof, shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act upon said contract or submission with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided, the arbitration shall be by a single arbitrator.

§1460. *Arbitration a special proceeding.*

Arbitration of a controversy under a contract or submission described in section fourteen hundred forty-eight shall be deemed a special proceeding, of which the court specified in the contract or submission, or if none be specified, the supreme court for the county in which one of the parties resides or is doing business, or in which the arbitration was held, shall have jurisdiction.

Any application to the court, or a judge thereof, hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§1461. *Motion to confirm award.*

At any time within one year after the filing or delivery of an award made as prescribed in section fourteen hundred sixty any party to the controversy which was arbitrated may apply to the court having jurisdiction as provided in section fourteen hundred fifty-nine for an order confirming the award; and thereupon the court must grant such an order unless the award is vacated, modified or corrected, as prescribed in sections fourteen hundred sixty-two, fourteen hundred sixty-two-a and fourteen hundred sixty-three or unless the award is unenforceable under the provisions of section fourteen hundred fifty-eight. Notice of the motion must be served upon the adverse party or his attorney, as prescribed by law for service of notice of a motion upon an attorney in an action in the same court. In the supreme court, the motion must be made within the judicial district embracing the county where the judgment is to be entered.

STATEMENT OF THE CASE

By an agreement in writing executed by the Petitioner and the Respondent under date of July 31, 1952 (R. 9), Respondent employed the Petitioner to serve as superintendent of Respondent's lithographic and printing plant in North Bennington, Vermont. The employment was to continue for a period of three years commencing August 1, 1952 and terminating July 31, 1955, with compensation for the Petitioner at the annual rate of $15,000. (R. 4-9). The agreement also expressly stipulated that Petitioner should not be entitled to any additional compensation for any service "which he may perform as a member of any managing committee of Employer, or in the event he shall at any time be elected an officer or director of Employer" (R. 7).

This agreement was executed by the parties in the State of New York (R. 13, 20). The Petitioner was then a resident of Westchester County, State of New York; the Respondent was then, and at all times involved in this case has been, a New York Corporation having its principal office at 310 East 45th Street, New York City (R. 4).

The foregoing agreement stipulated that the Petitioner, on or before beginning his employment, should, with his family, take up residence in or near North Bennington, Vermont, where the plant is located (R. 5).

Petitioner undertook his duties pursuant to the agreement on August 1, 1952 and purported to continue in the performance thereof until October 22, 1952. On that date the Respondent discharged Petitioner for alleged derelictions in his duties (R. 9).

On February 10, 1954, the Petitioner commenced an action (a Plea of contract) against the Respondent in the County Court, Bennington County, State of Vermont, charging the Respondent with breach of the foregoing agreement by discharging the Petitioner; caused its goods, chattels or estate to be attached to the value of $31,000 (R. 3) and claimed to recover damages in the amount of $30,000 and just costs (R. 10).

The process was served on the Respondent on February 15, 1954 and a copy of the complaint was received by the Respondent on the same date (R. 2).

On March 5, 1954, Respondent, as defendant in said action, petitioned the United States District Court for the District of Vermont to remove the case from the Vermont court to that court. The petition was based upon the diversity of citizenship of the two parties, the Respondent (defendant) being a New York corporation and the Petitioner (plaintiff) then being a resident of Vermont and the amount in controversy being in excess of the required $3,000. (R. 1-2).

Removal was allowed and on March 10, 1954 the Respondent (as defendant) filed its answer and a counterclaim in the action (R. 10). On April 23, 1954 Petitioner filed a general denial to the Respondent's counter claim (R. 13).

In its answer the Respondent duly invoked an arbitration provision contained in the agreement.

Since the questions before the lower United States courts and now before this Court relate to the revocability of that provision, we interrupt the further chronology in this statement of the case to indentify the arbitration provision, its scope, and the consequences accorded it in the courts below.

In their foregoing agreement of July 31, 1952 the parties included a provision that any dispute arising between them in connection with the container agreement should be settled by arbitration. As stated above, this agreement was executed in the State of New York, by and between two New Yorkers.

The arbitration provision in said agreement provides that (1) any arbitration thereunder shall be in New York, (2) by the American Arbitration Association (a non-profit New York corporation with principal office in New York City), or a panel of its arbitrators, and (3) that such arbitration shall be governed by the rules of said Association and by the New York Arbitration Statute.

This arbitration provision is contained in paragraph "Eleventh" of the Agreement and reads as follows:

"ELEVENTH: The parties hereto do agree that any differences, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration, by the American Arbitration Association, or its successor and that the determination of said American Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matters shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere." (R. 7-8).

A further paragraph, "Fourteenth", of the agreement reads as follows:

"FOURTEENTH: The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the state of New York and that in any action special proceeding or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted." (R. 9).

The pertinent provisions of the New York Civil Practice Act

" relating to arbitrations as referred to in the foregoing paragraph "Eleventh" of the agreement are contained in Article 84, New York Civil Practice Act, §1448-1469 and constitute the New York arbitration statute.

The rules and regulations of the American Arbitration Association pertinent to the questions involved in this case, and in effect at all times material in this case are as follows:

1. *Agreement of Parties* — The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever, in the Submission or other written agreement, they have provided for arbitration by the American Arbitration Association or under its Rules. These Rules and any amendment thereof shall apply in the form obtaining at the time the arbitration is initiated.

3. *Administrator* — When parties agree to arbitrate under these Rules or provide for arbitration by the American Arbitration Association and an arbitration is initiated thereunder, they thereby constitute the American Arbitration Association the Administrator of the arbitration. The authority and obligations of the Administrator are limited in the manner prescribed in the agreement of the parties, and in these Rules.

7. *Initiation under an arbitration provision in a contract* — Any party to a contract containing a clause providing for arbitration by the American Arbitration Association or under its Rules, or any party to a contract containing a general arbitration clause, when the parties have agreed by stipulation or otherwise, to arbitrate under the Rules of the American Arbitration Association, may commence an arbitration in the following manner:

(a) By such party giving written notice to the other party of intention to arbitrate (Demand), which notice shall contain a statement setting forth the nature of the dispute, the amount involved if any, the remedy sought; and

(b) By filing with the Administrator at any of its

offices two copies of said notice, together with two copies of the contract or such parts thereof as relate to the dispute, including the arbitration provisions and the Administrator shall give notice of such filing to the other party.

The party upon whom the demand for arbitration is made may, if he so desires, file an answering statement with the Administrator within seven days after notice from the Administrator, in which event he shall also send a copy of his answer to the other party. If no answer is filed within the stated time, it will be assumed that the claim made is denied. Failure to file an answer shall not operate to delay the arbitration.

After the filing of the claim, and answer if any, if either party desires to make any new or different claim such claim shall be made in writing and filed with the Tribunal Clerk and a copy thereof mailed to the other party who shall have a period of seven days from the date of such mailing within which to file an answer with the Tribunal Clerk. However, after the Arbitrator is appointed no new or different claim may be submitted to him except with the consent of the Arbitrator.

10. *Fixing of locality.* The parties may mutually agree on the locality where the arbitration is to be held. If the locality is not designated in the contract or Submission, or if within seven days from the date of filing the Demand or Submission, the parties do not notify the Administrator of such designation, it shall have power to determine the locality and its decision shall be final and binding. In the event, however, that any party requests that the hearing be held in a specific locale and the other party files no objection thereto, within seven days after notice of the request, the locale shall be that requested by the party.

12. *Appointment from panels.* If the parties have not appointed an Arbitrator and have not provided any other method of appointment, the Arbitrator shall be appointed in the following manner: Immediately after the filing of the Submission or copy of a Demand, as required under Rule III, the Tribunal Clerk shall submit simultaneously

to each party to the dispute, an identical list of names of persons chosen from the Panels. Each party to the dispute shall have seven days from the date of the mailing of such lists in which to examine said list, cross off any names to which he objects and number the remaining names indicating the order of his preference, and return the list to the Tribunal Clerk. When any party or both parties fail to return the list within the time specified all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference if any, the Tribunal Clerk shall invite the acceptance of an Arbitrator to serve. If the parties fail to agree upon any of the persons named or if those named decline or are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator shall have power to make the appointment from other members of the Panels without the submission of any additional lists.

29. *Arbitration in the absence of a party.* Unless the law provides to the contrary, the arbitration may proceed in the absence of any party, who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The Arbitrator shall require the other party to submit such evidence as he may require for the making of an award.

39. *Serving of notices.* Each party to a Submission or other agreement which provides for arbitration under these Rules shall be deemed to have consented and shall consent that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these rules and for any court action in connection therewith or for the entry of judgment on any award made thereunder may be served upon such party (a) by mail addressed to such party or his attorney at his last known address or (b) by personal service, within or without the state wherein the arbitration is to be held (whether such party be within or without the United States of America), provided that reasonable opportunity to be heard with regard thereto has been granted such party.

Resuming the chronology of events in this case, we return to the answer of the Respondent (as defendant) in the United States District Court for the District of Vermont.

The Respondent pleaded matters in justification of its discharge of the Petitioner, and by counterclaim alleged breaches of the agreement by the Petitioner prior to his discharge wherefore it claimed damages resulting therefrom in the amount of $27,000.00 (R. 10).

As a further defense, the Respondent invoked the above quoted arbitration provision in paragraph "Eleventh" of the agreement, setting forth that the Petitioner by commencing this action in the Vermont court committed a default under, and breach of, said agreement to arbitrate and also a breach of paragraph "Fourteenth" of said agreement, quoted above (R. 11).

Respondent further pleaded in said answer that by force of the foregoing arbitration provision in paragraph "Eleventh" of the agreement, the rights of the parties in this action should be governed by the law of the State of New York, and not by the law of the State of Vermont, and that by the pertinent law of the State of New York the Petitioner was not entitled to maintain his action in the United States Court for the District of Vermont (R. 12).

On May 3, 1954 the Respondent by letter mailed to the Petitioner, with copy to the American Arbitration Association, duly demanded arbitration pursuant to the above quoted Rule of the American Arbitration Association and paragraph "Eleventh" of the agreement (R. 14-15).

Thereafter, on May 6, 1954, Respondent also filed in the District Court its petition that the action as brought by the Petitioner against Respondent be stayed pending arbitration of the matters in controversy embraced therein. It based said petition upon the arbitration provision in paragraph "Eleventh" of the agreement, the rules of the American Arbitration Association, and the applicable law of the State of New York relating to said arbitration agreement. It alleged that, under said provision for arbitration and the applicable law of the State of New York, the Petitioner cannot revoke the arbitration provision and maintain this action and that the Respondent is entitled to have arbitration in the State of New York of the issues now in litigation and to have judgment entered upon an award rendered therein; that the law of New York, and not of Vermont, governs in

determining the revocability of this arbitration provision in paragraph "Eleventh" of the parties' agreement (R. 14).

The cause came on for hearing in the District Court for Vermont at Brattleboro, Vermont, on June 22, 1954 (R. 16).

At this time Petitioner applied to the court for a temporary injunction to restrain the Respondent from proceeding further with an arbitration in the State of New York which had been duly initiated by the Petitioner's demand for arbitration pursuant to the rules of the American Arbitration Association set out in its letter of May 3, 1954 to the Petitioner as reported above (R. 16).

On July 8, 1954 the District Judge (Ernest W. Gibson) decided the case by denying the Respondent's petition for stay of the action pending arbitration. In avowed exercise of his discretion, he also denied Petitioner's application for the temporary injunction to restrain Respondent from proceeding further with an arbitrator in the State of New York on the ground that the need therefor "has not been shown convincingly" (R. 17).

The District Judge summarized Respondent's contentions in support of its petition for stay of the action pending arbitration as being that it claimed that it was entitled thereto on three independent grounds as follows:

"1. Under the authority of the Federal Arbitration Act, so-called, as set forth in 9 U.S.C.A.;

"2. That the parties have validly contracted to adjust contractual disputes by arbitration;

"3. That a Vermont court would, under like circumstances, stay the present action." (R. 16).

The Court further summarized "that all three of the defendant's

contentions are centered in one issue, i.e.: what would a state court of this jurisdiction do were the instant motion before it?" (R. 16-17).

The Judge concluded that this being a diversity case the District Court was bound under *Erie R. R. Co. v. Tompkins*, 304 U.S. 64 "by the substantive law" of the State of Vermont; that there being no statutory law governing arbitration in Vermont, common law rules must apply; that by the common law rule of Vermont an agreement to submit an issue to arbitration is revocable at any time prior to award rendered; and that such being the law of Vermont, defendant's motion for stay of the action must be denied. (R. 17).

Respondent appealed to the United States Court of Appeals, Second Circuit. That court, by its judgment dated January 19, 1955, reversed the ruling of the District Court (R. 25).

In the Court of Appeals the Respondent advanced its case primarily by way of opposition to what appears to have been the overall view of the District Judge, namely, that even though this arbitration provision qualified under Section 3 of the United States Arbitration Act, and even though the action were otherwise subject to stay under that section, the District Court could not stay the action under that section because of the general common law rule of revocability of arbitration agreement obtaining in Vermont; that under *Erie R. R. v. Tompkins*, 304 U.S. 64, the District Court of Vermont must apply the Vermont rule of revocability as the "substantial law" of that state.

The Court of Appeals unanimously ruled that Section 3 of the United States Arbitration Act can be invoked in such a case wherein federal jurisdiction is based on diversity of citizenship of the parties, and that a stay pursuant to that section of that Act "is not 'substantive' within the meaning of *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, and *Guaranty Trust Co. v. York*, 326 U.S. 99." (R. 23)

This Court granted the petition for Certiorari on May 31, 1955 (R. 26).

QUESTIONS PRESENTED.

Two parties, both residents and citizens of the State of New York, entered into and executed, in the State of New York, a written contract whereby the one party employed the other party as superintendent of the first party's manufacturing plant in the State of Vermont.

Said written agreement contained an arbitration provision whereby the parties agreed to submit to arbitration any dispute thereafter arising between them in connection with the container contract. Said arbitration provision further provided that any such arbitration should be had in the State of New York and that it should be governed by the rules of the American Arbitration Association (a non-profit New York corporation with its principal office in New York City) and by the arbitration statute of the State of New York.

An action in contract brought in a Vermont Court by one party against the other involving a dispute arising in connection with the container contract and within the coverage of the arbitration provision was removed by the defendant to the United States District Court for the District of Vermont. Diversity of citizenship of the parties alone supports federal jurisdiction of the case. The following questions are presented:

1. Do *Erie R.R. v. Tompkins*, 304 U.S. 64 and *Guaranty Trust Company v. York*, U.S. 99 require in such case that the revocability of the foregoing arbitration provision shall be judged by any law of the State of Vermont relating to the revocability of arbitration agreements?

2. Is the defendant in the foregoing action (the Respondent herein) entitled to a stay of the action in the United States District Court for the District of Vermont in accord with the arbitration statute of the State of New York?

3. Is the defendant in the foregoing action (the Respondent herein) entitled to a stay of the action in the United States District Court for the District of Vermont in accord with Section 3 of the United States Arbitration Act?

SUMMARY OF ARGUMENT

Argument I ~~The New York~~ Arbitration Act is an integral part of the contract made by these parties, because they made it in New York state, while they were New York residents, and expressly incorporated in the contract the pertinent provisions of the New York Statute. The New York contract is therefore entitled to full faith and credit under Article IV, §1 of the United States Constitution, and a federal district court should honor the contract by staying an action brought in breach thereof.

Argument II The decision of the Court of Appeals in this case that respondent's petition for stay was "not 'substantive'" within the meaning of *Erie R. R. v. Tompkins and Guaranty Trust Co. v. York* was correct because (1) the stay was sanctioned by an act of Congress, and (2) proper identification of this contract invokes Vermont conflict of law doctrines which in turn require a federal district court to honor the New York contract thus identified.

I. ANY COMMON LAW OF VERMONT MAKING COMMON LAW ARBITRATION PROVISIONS REVOCABLE IS IRRELEVANT IN THIS CASE AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT IS BOUND TO GIVE FULL FAITH AND CREDIT TO THE NEW YORK ARBITRATION STATUTE BY STAYING THIS ACTION.

The Petitioner is seeking by the use of *Erie R. R. v. Tompkins*, 304 U. S. 64 and *Guaranty Trust Co. v. York*, 326 U. S. 99, to revive and give new vitality to a common law tradition of dubious origin and waning validity in Anglo-American law. That tradition has it that common law arbitration agreements are revocable in that they can be revoked by either party by due notice before award rendered and in that they cannot be pleaded to defeat an action in court brought in defiance of them. This is the tradition which the learned District Judge Hough, after searching for its validity, concluded some forty years ago, stands rather "upon the antiquity of the rule than upon its excellence or reason." In so concluding his research concerning it he observed: "It has never been denied that the hostility of English-speaking courts to arbitration contracts probably originated (as Lord Campbell said in *Scott v. Avery*, 4 H. L. Cas. 811) — 'in the contests of the courts of ancient times for extension of jurisdiction — all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.'

"A more unworthy genesis cannot be imagined. Since (at the latest) the time of Lord Kenyon, it has been customary to stand rather upon the antiquity of the rule than upon its excellence or reason: 'It is not necessary to say how this point ought to have been determined if it were res integra — it having been decided again and again,' etc. Per Kenyon J., in *Thompson v. Charnock*, 8 T. R. 139." *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co. Limited* (D. Ct. S. D. New York, 1915) 222 Fed. 1006, 1007-1008).

It is the same tradition which Judge Cardozo challenged in simi-

lar vein in 1921 in his opinion for the New York Court of Appeals which unanimously sustained the New York Arbitration Law of 1920 against various attacks on its constitutionality.

"It was followed," he wrote, "with frequent protest, in deference to early precedents. Its hold upon the common law was hesitating and feeble. We are now asked to declare it so imbedded in the very foundations of our jurisprudence and the structure of our courts that nothing less than amendment of the Constitution is competent to change it. We will not go so far. The judges might have changed the rule themselves if they had abandoned some early precedents, as at times they seemed inclined to do. They might have whittled it down to nothing as was done indeed in England by distinctions between promises that are collateral and those that are conditions." *Berkovitz v. Arbib & Houlberg*, 230 N. Y. 261, 276 (1921).

While we do not consider this common law tradition of revocability of common law arbitration agreements of any controlling significance in this case for reasons indicated below, we will take note of how feeble and tenuous is its hold upon the common law of Vermont.

We have been able to find no other Vermont cases beyond those cited by the Petitioner on the matter. Our reading of those cases leaves us in doubt that one of them, *Welch v. Miller*, 70 Vt. 108 (1900), touches upon the matter.

All of the remaining Vermont cases involved an agreement of submission of a difference over a commercial matter then existing between the parties; none involved a provision in a more general container contract to arbitrate disputes arising between the parties in the future in connection with that contract.

These cases related more or less to the effect of a notice of revocation of the particular submission agreement. In all but one of the cases it appears to have been assumed by the Court that the given submission was revocable by notice before award rendered; in the one, *Marsh v. Packer*, 20 Vt. 198, the Court observed that "counsel for both sides" admitted revocability by the notice. In none of these Vermont cases,

as we understand them, was the question of common law revocability involved more than incidentally and in a process of reasoning leading to the resolution of another and precise issue in the case. In none of them was the tradition challenged; in none of them did the Court advance any reason to support common law revocability — not even its antiquity. The matter passed unconsidered. The latest comment of the Court is that quoted by the Petitioner in his brief from *Mead's Administratrix v. Owen*, 83 Vt. 132, 135. That was in 1910.

On this record, we take the position that the Supreme Court of Vermont should not be deemed committed to common law revocability of common law arbitration agreements. It seems clear that neither by statute nor by decision of that Court has common law revocability of common law arbitration agreements become imbedded in the jurisprudence or public policy of the State of Vermont. Certainly it may be urged that Vermont has manifested "no real antagonism against" such arbitration provisions. At the very least it is doubtful what is the common law of Vermont in 1955 with respect to this matter.

We have followed this line of inquiry to this conclusion because it seems to be the purpose of the Petitioner to emphasize that common law revocability of common law arbitration agreements has become imbedded in the jurisprudence and policy of that State. This view seems to have been accepted in the decision in the District Court.

We turn from further inquiry along this line because we maintain that whatever may be the common law of Vermont with respect to revocability of common law agreements it does not govern in this case.

We base our position in this connection on the ground that the arbitration provision in this case was not born of the common law, nor has it ever become subject to the common law traditions of revocability or non-enforceability. Instead it was born under the New York arbitration statute and upon the making of the provision by these parties and at all times since it has been subject to and sustained by that statute which makes it irrevocable and enforceable contrary in all particulars to any common law revocability and non-enforceability.

The arbitration provision involved in this case is contained in a

contract in writing. It was signed and executed by the Petitioner and the Respondent in the State of New York. Both parties were then residents and citizens of the State of New York. Upon its execution by these parties it qualified under the New York arbitration statute as a contract "to settle by arbitration a controversy thereafter arising between them" as provided in N.Y.C.P.A. §1448; it was "in writing" pursuant to N.Y.C.P.A. §1449. By the same token it then and there became subject to §1448 declaring that it "shall be valid, enforceable and irrevocable." Thereupon, also, the statutory remedies of the statute (motion proceedings) became effective and available to the parties to make the provision "valid, enforceable and irrevocable." These statutory remedies are severally designed precisely to overcome and displace all instances of common law revocability and common law non-enforceability of arbitration agreements.

Thus, §1451 nullifies common law revocability by action of this arbitration provision. If the Petitioner had brought his action against the Respondent in a court of the State of New York and the Respondent had applied for stay of action pending arbitration as it did in the District Court, the New York court would have been bound to grant it pursuant to §1451. By that section the court "shall", upon the application, "stay all proceedings in the action", until arbitration is had "in accordance with the terms" of the arbitration contract.

Common law non-enforceability is displaced with respect to this arbitration provision by §1450; specific enforcement by statutory motion is provided. By this section of the statute the party aggrieved (the Respondent) by the failure, neglect or refusal of the other party (the Petitioner) to go forward in compliance with such arbitration provision can, upon petition to the Supreme Court of the State of New York, obtain an injunctional order directing the recalcitrant party to comply with the arbitration provision and carry out his part of the arbitration agreement.

By way of further specific enforcement of the agreement §1453 enables the aggrieved party, when need arises to establish or restore the arbitral board, to apply to and obtain from the Supreme Court of the State of New York, the appointment of arbitrators or an umpire.

The one or more so appointed by the Court "shall act under the said contract or submission with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided, the arbitration shall be by a single arbitrator."

These are the remedies provided by the statute whereby the courts of the State of New York, and particularly the Supreme Court of the State, can be called upon to fulfill the mandate of the statute that arbitration agreements like the one involved in this case "shall be valid, enforceable and irrevocable."

When an award shall have been rendered in an arbitration under this arbitration provision, the successful party may, by the statutory motion of §1461, apply to the Supreme Court of the State of New York to have it confirmed; "and thereupon the court must grant such an order" unless the award is subject to vacation, modification, correction or defeat for one of the causes provided in other sections of the statute. By §1464 upon granting the order confirming the award judgment may be entered conforming thereto and by §1466 the judgment so entered "has the same force and effect, in all respects as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered."

In view of the foregoing sections of the New York arbitration statute and their application to the arbitration now under consideration we identify it as a New York statutory arbitration provision. From its making by the parties it has been "valid, enforceable and irrevocable" in disregard of any common law of revocability or non-enforceability and the statute provides the precise statutory remedies to make it so.

We will next emphasize that there is no special fact or circumstance attending this arbitration provision which at any time displaces the applicability of the New York arbitration statute or which curtails or forecloses its remedies.

This, while the contract containing this arbitration provision contemplated, indeed, expressly provided, that the Petitioner should move

to Vermont and carry out at least the major part of his duties in Vermont, this stipulation for this out-of-state performance of the container contract did not displace the applicability of the New York arbitration statute nor curtail its remedies.

The New York courts have so decided. To verify this we will start with *Marchant v. Mead-Morrison Co.*, 252 N.Y. 284, 169 N.E. 386, decided by the New York Court of Appeals in 1929. In that case a Maine corporation contracted to sell and deliver tractors to a New York corporation. The contract was executed in Massachusetts. The tractors were to be manufactured and delivered in Massachusetts. This contract contained the following arbitration clause:

"If for any reason any controversy or difference of opinion shall arise as to the construction of the terms and conditions of this contract, or as to its performance, it is mutually agreed that the matter in dispute shall be settled by arbitration, each party to select an arbitrator, and the two so selected to select a third, and the decision of the majority of such arbitrators given after full hearing and consideration of the matter in controversy shall be final and binding upon the parties, and a condition precedent to any suit upon or by reason of any such controversy or difference. The cost of such arbitration shall be paid by the party against whom the majority of such arbitrators render such decision."

Dispute arose between the parties. Each party appointed one arbitrator, but the two so appointed, and apparently the parties likewise, were unable to agree upon the third.

The Court of Appeals was confronted with the following question: Did the Supreme Court, or judge thereof, have power under section 4 of the New York law (C. P. A. § 1452) to appoint the third arbitrator and direct the parties to proceed with an arbitration? The appointment had been made, and the order to proceed had been granted upon the petition of the buyer, the seller having appeared generally to contest the granting of the application.

The seller attacked the legality of the order upon two grounds. As a first point it argued that the arbitration provision, as quoted above,

provided for arbitration in Massachusetts and nowhere else, and that therefore the New York court had no power to act under section 4 (C.P.A. §1452) of the New York law. This objection was denied. Chief Judge Cardozo observed upon the matter as follows:

"The order, it is said, is void, because the parties to the contract in agreeing to arbitrate their difference had in view an arbitration in Massachusetts, and not performance somewhere else. Whether this was their meaning was, however, a question of construction, to be determined like any other question of construction by the judge receiving the petition. Jurisdiction was not dependent upon his determining it correctly. *We must distinguish between the place of performance in respect of manufacture and delivery and the place of performance for the settlement of differences. The contract was to be performed in Massachusetts to the extent that the things to be sold were to be there manufactured and delivered. The conclusion does not follow of necessity that the remedy prescribed for the settlement of differences was to be sought in the same forum.* At common law, general contracts of arbitration, though not specifically enforceable, were not held to be illegal. This is seen from the fact that in case they were broken there might be a recovery of damages (*Matthew of Berkovitz v. Arbib & Houlberg*, 230 N.Y. 261, 271; *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 121). The statute of New York does not bring the contract into being, but adds a new implement, the remedy of specific performance, for its more effectual enforcement. *This remedy may lawfully be extended to contracts of manufacture made in Massachusetts and there to be performed, unless it is one of the terms of the arbitration clause, implied if not express, that the arbitration shall proceed in a particular locality. Express restriction there is none in the contract now before us. Whether one is to be implied is a question of intention to be determined in the light of context and occasion. That is what was done. The court in the discharge of its judicial function was called upon to declare the implications of the promise. We do not say at this time that the determination was free from error. Enough for present purposes that it is not to be ignored as void.*" (Italics supplied).

The second objection advanced by the seller was as follows: That the New York court had no power to appoint the third arbitrator for,

by doing so, it nullified the contract to arbitrate as made by the parties in Massachusetts which expressly provided that the two arbitrators nominated by the parties should select the third. This objection also was overruled.

We turn next to *In the Matter of Gantt (Hurtado & C I A)* decided by the New York Court of Appeals in 1948, 297 N.Y. 433, 79 N.E. 2d. 815. The situation of the parties and the terms of their arbitration provision varied from those in the Marchant case as follows: (1) Both parties (rather than one of them) were at all times non-residents of the State of New York; (2) Their arbitration provision called for arbitration in New York.

Thus, Gantt, a resident of North Carolina, entered into a contract with Hurtado, a Nicaraguan partnership, to buy tropical woods, shipments by Hurtado to be f.o.b. Nicaraguan ports to Gantt in North Carolina. This contract was executed by the parties in North Carolina. Contained in this contract was the following arbitration provision: "Any controversy or claims arising out of or relating to this contract or the breach thereof shall be settled by arbitration in accordance with the rules of the Inter-American Commercial Arbitration Commission. This agreement shall be enforceable and judgment upon any award rendered by the arbitrators or a majority of them may be entered in any Court having jurisdiction. The arbitration shall be held in New York, N.Y."

Dispute arose between the parties. Hurtado demanded arbitration. Gantt did not reply to the demand but petitioned the Supreme Court of New York to *stay the arbitration*. He urged that by the law of North Carolina the arbitration provision was "void" and therefore he could not be required to arbitrate anywhere. The trial court and the Court of Appeals found that North Carolina decisions had ruled that other arbitration provisions (not this one) were revocable and non-enforceable according to common law tradition. But this did not mean that they were "void". In the trial court, in the Appellate Division and in the New York Court of Appeals Gantt's petition was denied.

Said the Court of Appeals: "Having thus found that the arbitration treaty we are passing on was not void but unenforceable only, at

the place where made, we turn to the question of whether it may be compulsorily enforced by the courts of New York. *The place of performance of the arbitration section, though not other parts of the September agreement, was to be in New York. The New York statute (Civ. Prac. Act, art. 84) provides complete compulsion and full enforcement, as to such promises to arbitrate future-arising disputes.*" (P. 438). (Italics supplied).

And to Gantt's further argument that the refusal of this application for the stay of arbitration would deprive him of the privileges and immunities to which he was entitled under Section 2 of Article IV of the United States Constitution and that to allow the arbitration to proceed in New York would be a denial of full faith and credit to the laws of North Carolina, the Court of Appeals responded as follows: "The pertinent North Carolina law, as we have seen, goes only so far as to deny enforceability in its courts to such an arbitration clause, while these parties covenanted that they would, in case of dispute, go into New York State and there submit to an arbitration under the New York statutes; the New York statutes fully enforce such agreements and provide court machinery for compelling the parties to go through with their own arrangements for the settlement of their differences in a private tribunal of their own selection, rather than in a court of law." (P. 440).

These parties "*solemnly promised to arbitrate their controversies in New York*," said the Court; "*and by case and statute the law of New York then was, and now is, that such an agreement is 'a consent of the parties thereto to the jurisdiction of the Supreme Court of this state to enforce such contract or submission*' (Civ. Prac. Act, §1450 x x x)" (P. 439). (Italics supplied).

It is clear, we submit, that the arbitration provision in the present case is tied in more with the State of New York and its arbitration statute — and expressly so — than were the provisions in the foregoing cases. In this connection, we will note first the fact that both the Respondent and Petitioner were New York citizens and residents when they entered into their agreement. In such a case, *and with no express tie-in with the New York statute, the* New York courts have granted

the same order to proceed with arbitration as did the Court in the Marchant case.

Such was the ruling of the New York courts in *P. Beiersdorf & Co., Inc. v. Duke Laboratories, Inc.* (Sup. Ct. Sp. Term, New York County, Pt. 1, 1949) 94 N.Y.S. 2d. 18; aff'd. without opinion, 277 App. Div. 768, 97 N.Y.S 2d. 538 (1950); aff'd. without opinion, 301 N.Y. 707, 95 N.E. 2d. 55 (1950).

In this case two New York corporations with offices in New York entered into a commercial contract in the State of New York in 1936. It related to the distribution by one party of the products manufactured by the other. Their contract contained the following arbitration provision: "In case of any difference of opinion between the parties as to any matter arising out of this agreement, such difference shall be determined by a person mutually agreeable to both sides or by usual arbitration methods, but such arbitrators shall have no power, right or authority to do any act or make any decision, which will draw into question the sole, absolute and complete ownership by Beiersdorf of its trade marks."

After the parties had executed their contract and entered upon its performance both of them moved their offices and plants to the State of Connecticut.

Thereafter dispute arose between the parties. Beiersdorf moved under the New York arbitration statute, §1450, in the New York Supreme Court for an order that Duke Laboratories proceed with arbitration pursuant to the parties' foregoing arbitration provision. Duke appeared and made a cross-motion to dismiss the petition, or, in the alternative, to stay arbitration pending determination of an action then pending between the parties in the State of Connecticut.

With respect to this alternative part of Duke's motion, it is to be noted that prior to Beiersdorf's motion for an order to require Duke to arbitrate, Duke had begun a civil action against Beiersdorf in the Superior Court of Fairfield County in Connecticut to have their foregoing contract of 1936 declared invalid on the ground that the parties

had intended it to be only a "political" document; that the parties never intended that it should be binding.

On Beiersdorf's foregoing application for the order to proceed with arbitration, the judge at Trial Term of the Supreme Court of New York heard the parties, including Duke's claim as to the invalidity of the contract. Finding no substantial evidence in support of Duke's contention as to the inability of the contract, the Court ordered the parties to proceed with arbitration and denied Duke's cross motion to dismiss and the alternative part thereof, namely, to stay arbitration pending the Connecticut action.

Said the Judge in so ruling: "*The contract of 1936 was made in this state by New York corporations and therefore is a consent to the jurisdiction of this court to enforce the contract.* Civil Practice Act, §1450. The only question that may be raised preliminarily is as to the making of the contract and a substantial issue must be raised as to that question to prevent the court from forthwith directing the parties to proceed to arbitration." (P. 21). (Italics supplied).

As indicated above, after taking account of Duke's claim that the parties did not intend their contract to be binding on them, but finding no facts to support it, the Court concluded: "In the light of these circumstances, no substantial issue has been raised as to the making of the contract and the parties are directed to proceed to arbitration." (P. 22). (All of this pursuant to §1450.)

And with respect to the Connecticut litigation pending between the parties, the Court further observed: "In so holding, the court is mindful of the Connecticut action. However, that action has two objects in view: one, to declare the contract invalid *which this court by this decision has determined otherwise; and, as pointed out above, this court has jurisdiction of that question by consent of the parties.* Secondly, it raises the question of ownership of the trademarks. There is nothing inconsistent in the arbitration and the Connecticut action on these grounds. In fact such separate proceedings are necessary because the parties so desired it, as evidenced by the contract [to arbitrate]. (P. 22). (Italics supplied).

In view of the foregoing New York decisions, we submit that there can be no doubt that the New York courts would accord the foregoing statutory remedies of specific enforcement of the arbitration provision in this case both by appointing one or more arbitrators or an umpire were it necessary to establish or maintain the arbitral board and by ordering the recalcitrant party (the Petitioner) to comply with and carry out his part of the agreement to arbitrate (rather than sue in court in breach thereof as he did in Vermont). And by *Beiersdorf v. Duke Laboratories*, these remedies would be accorded notwithstanding that the Petitioner's Vermont action were then pending.

It will now be emphasized that the arbitration provision and its container contract in this case are tied in with the State of New York and its arbitration statute more fully and expressly than were those either in the Marchant and Gantt cases or in the Beiersdorf case. The container contract in the present case was executed by New Yorkers in the State of New York. The arbitration provision expressly stipulates that arbitration shall be by the American Arbitration Association, or arbitrators designated by it, and that the arbitration shall be governed by the rules of that Association and the New York arbitration statute. The American Arbitration Association was at the time of this agreement and is now a New York non-profit corporation with its offices and arbitration tribunals in New York City.

It seems very clear that under this arbitration provision the New York courts would recognize and accord to this Respondent all the rights and privileges to proceed with arbitration and all of the enforcement remedies under the arbitration statute that were accorded in the foregoing cases.

It remains to note, however, that in the foregoing three cases both parties were voluntarily before the New York courts in the proceedings involved therein. We take note of that aspect of those cases to pose the following problem with respect to the present case: The Petitioner did as he agreed to do in the parties' container contract in that he moved to Vermont to undertake his principal duties under the contract; he became, it appears, a resident and citizen of Vermont. Suppose now, that at all times involved in this case he shall have remained a resident

and citizen of Vermont, and that he shall not at any time come within the State of New York. Does such continued absence defeat Respondent's rights under the arbitration provision and the New York arbitration statute? Are its enforcement remedies foreclosed or curtailed by Petitioner's departure and continued absence from New York?

It is clear under the New York decisions that both of these questions are to be answered in the negative.

We cite the foregoing Beiersdorf case for the New York law that when the two New Yorkers in this case executed their contract in New York they then and thereby consented to the jurisdiction of the Supreme Court to accord the enforcement remedies of the New York arbitration statute to either party against the other. It seems equally clear by that case that the subsequent departure of Petitioner to Vermont and his continued stay outside New York did not affect his prior consent or the continuance of its efficacy.

Rule 39 of the American Arbitration Association also deserves attention at this point. By incorporating it in their arbitration provision each party "shall be deemed to have consented and shall consent *that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration* under these rules *and for any court action in connection therewith or for the entry of judgment on any award made thereunder may be served upon such party* (a) *by mail addressed to such party or his attorney at his last known address* x x x, provided that reasonable opportunity to be heard with regard thereto has been granted such party." (Italics supplied).

With this rule constituted a part of these parties' arbitration provision it is made especially clear that reasonable notice by mail to the Petitioner as provided in the rule is valid in New York and that a petition, upon such notice to Petitioner, by Respondent to the Supreme Court of the State of New York under the arbitration statute for the appointment of an arbitrator, if need therefor arises and for a general order to proceed to arbitration will be granted — the same orders as were granted in the Marchent case.

Matter of Application of *Heyman, Inc. And Cole*, 242 App. Div. 362, 275 N.Y.S. 23 (1934);

Matter of the Arbitration between *Gaban Lobo Co. And Haytian American Sugar Co.*, 271 App. Div. 316, 65 N.Y.S. 2d (1946);

Matter of Arbitration between *Liberty Country Wear, Inc. And Riordan Fabrics Co.* (Sup. Ct. Sp. Term, New York County, 1950) 197 Misc. 581, 96 N.Y.S. 2d. 134;

Prosperity Co. v. American Laundry Machinery Co., 271 App. Div. 622, 67 N.Y.S. 2d. 669; aff'd. without opinion 297 N.Y. 486, 74 N.E. 2d. 188 (1947).

The Supreme Court of California has held likewise (sustaining an order to proceed to arbitration) under the California arbitration statute which is of the same pattern as the New York arbitration statute. *Frey & Horgan Corp. v. Superior Court*, 5 Cal. 2d. 401 (1936).

But suppose that the Petitioner continues outside the State of New York and neglects or refuses to participate in the arbitration? The parties' arbitration provision and the New York arbitration statute give the Respondent right to an arbitration and an award.

An arbitrator being duly appointed by the American Arbitration Association pursuant to its Rule 12 (or by the Supreme Court of New York in event it should default in doing so) then, under Rule 29, the arbitrator may proceed ex parte (that is, in the absence of Petitioner). After due notice of the time and place of the hearing given by the arbitrator in compliance with Rule 39 above he will proceed at the time and place covered in the notice to hear the Respondent's evidence and render an award.

If the award is favorable to Respondent it can, upon due notice by mail to the Petitioner pursuant to Rule 39 above, have it confirmed and judgment entered thereon in the Supreme Court of New York — all as provided in the New York arbitration statute (§1461, 1464, 1466, C.P.A.).

Matter of Arbitration between *Bradford Woolen Corp. and Freedman* (Sup. Ct. Sp. Term, N.Y. County, 1947) 189 Misc. 242, 71 N.Y.S. 2d. 257;

Prosperity Co. v. American Laundry Machinery Co., 271 App. Div. 622, 67 N.Y.S. 2d. 669, aff'd. without opinion, 297 N.Y. 486, 74 N.E. 2d. 188 (1947);

Matter of Arbitration between *Liberty Country Wear Inc. And Riordan Fabrics Co.* (Sup. Ct. Sp. Term New York County, 1950) 197 Misc. 581, 96 N.Y.S. 2d. 134;

Republic Francaise v. Cellosilk Mfg. Co. (Sup. Ct. Sp. Term, N.Y. County, 1953) 124 N.Y.S. 2d. 93 (1953).

And such judgment will be accorded full faith and credit in jurisdictions outside the State of New York.

Mulcahy v. Whitehill (D.C.D. Mass. 1943) 48 F. Supp. 917;

Marvlo Fabrics v. Jarus (U.S.D.C.W.D. Mo. W.D. 1949);

Ripley Fabrics Corp. v. Hymen (D.C.N.D. Ill. E.D. 1950) 91 F. Supp. 1007;

Hirsch Fabrics Corp. v. Southern Athletic Co. (D.C.E.D. Tenn. N.D. 1951) 98 F. Supp. 436;

Kentucky River Mills v. Jackson (U.S.C.A. 6, 1953) 206 F2d. 111;

Tambro Fabrics Corp. v. Morton Hymen, 341 Ill. App. 396, 94 N.E. 2d. 93 (1950).

See also, *Gilbert v. Burnstine*, 255 N.Y. 348, 174 N.E. 706 (1931) and *Fauntleroy v. Lum*, 210 U.S. 230, 28 Sup. Ct. 641.

It will be noted in both groups of cases last cited above that the orders, awards and judgments were sustained although in none of them was the parties' arbitration provision tied in with the State of New York in one important particular that obtains in the present case. In this case, as distinguished from them, both parties were citizens and residents of the State of New York when they executed their agreement, and they did so in New York. The Beiersdorf case, reviewed above, teaches that, by reason of that further tie-in, even the more assured are the Respondent's rights to those orders, awards and judgments with respect to the arbitration provision in this case.

It remains to note *Lowengrub et al v. Meislin*, 376 Pa. 463, 103 A2d. 405 (1954). Articles of Partnership entered into the State of New York by New Yorkers carried a provision for arbitration of disputes arising between them by submitting the same "to the American Arbitration Association in accordance with the rules and regulations of the said American Arbitration Association then obtaining, and in accordance with the laws of the State of New York." One of the partners instituted a bill for accounting against the other partners in Pennsylvania. The defendants petitioned for stay of the action quite the same as did this Respondent in the District Court. The arbitration provision did not qualify under the Pennsylvania arbitration statute. Held, that the petition should be granted in accord with the rights of the defendants under the New York arbitration statute.

We submit that the District Court should likewise have granted the Respondent's petition for the stay in this case.

Indeed, the Respondent lays claim to the stay for which it petitioned in the District by virtue of the New York arbitration statute and the obligation of the District Court and of the Vermont court to accord that statute Full Faith and Credit as required by Article IV, §1 of the United States Constitution. These parties expressly invoked the New York arbitration statute in their arbitration provision. Upon their making that agreement it thereby and thereupon became "valid, enforceable and irrevocable" by the very words of the New York arbitration statute (§1449). The rights and remedies provided in that statute thereby and thereupon became an integral part of that agree-

ment at home (in New York) and abroad (including in Vermont). Included among those rights and remedies is the right to stay of this action as brought in the Vermont court and removed to the District Court. The New York arbitration statute is precise and specific in making this arbitration provision irrevocable by entitling the Respondent to the stay of Petitioner's action (§1451). We claim this right to stay on "a substantive right conferred by a statute of New York." The Respondent claims its right of stay under that statute and under Article IV, §1 of the United States Constitution and the decisions of this Court in *John Hancock Insurance Co. v. Yates*, 299 U.S. 178 and Order of *Travelers v. Wolfe*, 331 U.S. 586.

In the above cited cases the State courts and lower Federal courts already have established many of the realities of this claim. By sustaining the claim of the Respondent to the stay under this arbitration provision as a matter of right under the New York arbitration statute and the Constitution of the United States this Court will stabilize such arbitration provisions and accord them uniformity of validity and enforceability which is so clearly desirable in commercial contracts. It will foreclose further litigations like that involved in this case; it will obviate untoward races to arbitration and litigation and it will obviate various conflicts arising between proceedings in arbitration and in court actions and with respect to their respective awards and judgments.

We also point out finally that the Petitioner, by bringing his action in the Vermont court and in seeking to maintain it in the District Court, is bent upon a deliberate breach and repudiation of his agreements to arbitrate. The intent of that agreement or its making he cannot deny; nor does he pretend any justification for his actions. That repudiation of the arbitral process and substitution of the process of civil litigation is irreparable — that is a complete destruction of the contract to arbitrate—this Court well knows. It took account of substantial differences between the two processes of adjusting controversies in *Wilko v. Swan*, 346 U.S. 427 (pp. 436-437).

II. THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE RESPONDENT'S PETITION FOR STAY IN THIS CASE IS "NOT 'SUBSTANTIVE'" FOR PURPOSES OF *ERIE R. CO. V. TOMPKINS*, 304 U. S. 64, *AND GUARANTY COMPANY V. YORK*, 326 U. S. 599.

We identify the Court's characterization of the Respondent's petition for stay of the action as being "not 'substantive'" as referring to a going dichotomy involving the *Erie* and *York* cases. By that dichotomy matters "substantive" may, it appears, be posed in distinction to it, when federal jurisdiction rests only on diversity of citizenship, to follow the law of the state in which the District Court is sitting — matters "procedural". District Courts are required, as we understand that this is true in matters "substantive" but not, it is said, in matters "procedural". (Or, to put the matter in another way these matters of local, state law while, under the *Erie* and *York* cases, must be followed by the District Court may be "substantive", other matters not so required to be followed may be said to be "procedural"). At all events, it is clear that the Court of Appeals decided that the *Erie* and *York* cases should not, and did not control this Respondent's petition in this case — and that was the issue in the case; that was the issue decided.

We believe that this decision should be sustained in this Court by its identification of the rights which petitioner has attempted to assert in the removed action, and which respondent has challenged with its petition for stay of proceedings in the removed action. We believe that this identification should point out that petitioner was asserting in his common law declaration rights which he never had under the contract upon which he declared. The rights which petitioner had under the contract here were not created by Vermont law, but by the law of New York, the law of the place where the agreement was made, the place where the arbitration agreement was to be carried out, the law which the parties by express agreement agreed should govern their rights in the event of dispute. We have demonstrated in Argument I how completely these rights differed from the rights which were created under Vermont law in the common law submissions which were the subject matter of the cases which petitioner has urged

as controlling local law in this case. The New York statutes and cases leave it clear that the effect of this agreement was to substitute a prospective arbitration award for the traditional remedies for breach, when, as and if a situation should develop which would otherwise have caused petitioner's traditional remedies to come into play. We understand that this Court has made such an identification in *Wilko v. Swan*, 346 U.S. 427, where it decided that substitution of a prospective arbitral award for rights conferred by Congress was so substantial a modification of the rights conferred as to constitute a waiver of them. Here we think the same identification is necessary to discovery of what applicable local law is. Before continuing discussion of the reasons which lead us to conclude that the decision is one for this court to make, we interrupt to consider the treatment of Section 3 of the United States Arbitration Act which the lower federal courts have adopted since the decision of *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 499 (1935). It has been concluded in each of the five circuits that have considered it,[1] that Section 3 is an excerise of the Congressional power to regulate the procedure of the federal courts as provided in Article III, of the Constitution. So viewed, Section 3 of the Arbitration Act is identified as "merely a stay order of a kind long familiar in common law equity and admiralty actions," and that in exercise of this jurisdiction conferred, "it is our obligation to shake off the old judicial hostility to arbitration." See *Kulukundis Shipping Co., v. Amtorg Trading Corp.*, (2d Cir. 1942) 126 F. 2d. 978, 985, 987. There courts have also decided that an "issue referable to arbitration" under Section 3 may arise even though the container contract may not be a "maritime transaction" or "transaction involving commerce".[2]

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[1] See cases from other circuits as follows: *Donahue v. Susquehanna Co.*, 138 F. 2d. 3 (3d. Cir. 1943) at pages 5-6; *Agostini Bros. Bldg. Corp. v. United States*, 142 F. 2d. 854. (4th Cir. 1944); *Wilson & Co. v. Fremont Cake & Meal Co.*, 77 F. Supp. 364 (D. Neb. 1948); *Pioneer Trust & Sav. Bank v. Screw Machine Products* 73 F. Supp. 578 (E.D. Wis. 1947).

[2] The genesis of this view seems to be Judge Learned Hand's avowed dictum in *Shanferoke Coal & Supply Corp., v. Westchester Service*

Granted these premises it has followed that a district court (even if it attribute to local law all of the traditional consequences of invalidity, revocability and unenforceability) is not bound to recognize in this climate of judicial hostility a rule of decision for the federal courts.[3]

Corp., 70 F. 2d. 297, 298-299 (2d. Cir. 1934) concluding that such a result was indicated by supposed deliberate changes in the text of the federal act from that of the New York Act, after which the former was copied. Judge Goodrich in *Donahue v. Susquehanna Collieries Co.*, 138 F. 2d. 3, 406 (3d Cir. 1943) thought there was a significant difference between the subject matter of legislation in Section 3 and Section 2, and that the "generality of the language" in Section 3 did not suggest that its application was to be confined to cases falling within Section 2. Judge Parker in *Agostini Bros. Bldg. Corp., v. United States*, 142 F. 2d. 854, 855-856 (4th Cir. 1944) agreed and added to this by pointing out changes in the Senate Report of the proposed legislation changes which he thought tended to confirm the view that Congress did not intend to limit Section 3 to the subject matter of Section 2. These conclusions have not escaped criticism. See: Sturges and Murphy, "Arbitration Under the United States Arbitration Act" 17 Law & Contemp. Prob. 580, 609 (1952), pointing out that "the Act invites the reading of its sections into more correlated relationship."

[3] In accord with the opinion so holding of the Court of Appeals in this case is *Parry v. Bache*, 125 D. 2d. 493 (5th Cir. 1942). ~~And 342 U.S. 395, at page 363~~. It is recognized in *Angel v. Bullington*, 330 U.S. 183, 192, that where a federal right is claimed "the limitations upon the courts of a State do not control a federal court sitting in the State."

These decisions, honoring as they do the arbitration agreement in many[4] of the cases which come into federal court, have displaced the earlier recognition of the enforceability rule as the "general law" in federal courts, as to which, see: *California Prune & Apricot Growers Ass'n. v. Catz American Co.*, 60 F. 2d. 788 (9th Cir. 1932), *Loppe v. Wilcox* 14 F. 2d. 861 (N.D. N.Y. 1926), and *Rue v. Luzerne County*, 58 F. 2d. 829. (N. D. Pa. 1932). The contracts involved in these cases occupied a position then supposed to be outside the ambit of the federal act and the courts were left to apply revocability and unenforceability as the rule of decision in the federal courts, notwithstanding the agreement would be honored in state court. It is our contention that, independently of the federal statutes, these cases become obsolete with *Erie v. Tompkins*; that this court ought to interpret the arbitration agreement here involved as suspending the rights of the parties to compliance with the container contract, as those rights are traditionally conceived, and substituting the right to the prospective arbitration award.

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[4] Despite the view referred to in note 2, supra, there remains a substantial number of cases which are subject to the exclusion of certain contracts of employment contained in Section 1 of the United States Arbitration Act. Judge Goodrich originally advanced the view that the exclusion did not relate to Section 3 (see *Donahue v. Susquehanna Collieries Co.*, 138 F. 2d. 3 (3d Cir. 1943). but this has now been repudiated in *Amalgamated Ass'n. etc. v. Pennsylvania Greyhound Lines*, 192 F. 2d. 349 (3d Cir. 1951). In the instant case Judge Frank found the decisions of the California courts "most persuasive" in concluding that the contract of employment here involved was not within the classes of such contracts enumerated in and excluded from the federal Statute. Cases in which the exclusion provision has been found to require defeat of the arbitration agreement include: *Gatliff Coal Co. v. Cox*, 142 F. 2d. 876 (6th Cir. 1944); *Tenney Engineering v. U. E. R. & M. Wkrs.*, 207 F. 2d. 450 (3d Cir. 1953); *International Union v. Colonial Hardwood Floor Co.* (4th Cir. 1948) 168 F. 2d. 33.

So if we misconceive the Court's judgment as to the applicability of Art. IV, Section 1 of the United States Constitution, as contended for in Argument I, this identification would still (even in the absence of federal statute controlling) be decisive in a case such as this. Should this case stand in that posture then *Klaxon v. Stentor Electric Co.*, 313 U. S. 487, makes the conflict of laws doctrine of Vermont the applicable rule of decision.

Woodrow v. O'Conner, 28 Vt. 776 would seem to indicate that the lex locus establishes the rights of the parties to an arbitration agreement. *Vermont Mutual Fire Ins. Co. v. Van Dyke*, 105 Vt. 257 at page 259, and *Smith v. Anderson*, 70 Vt. 424, at page 426 indicate that the parties may eliminate doubt as to law governing a contract by their express stipulation on this point. And *Brown v. Perry*, 104 Vt. should leave it entirely clear that a Vermont court would not decline to recognize respondent's asserted rights for the reason that the New York agreement offended the public policy of Vermont. Again, granted the basic identification we urge, it becomes wholly immaterial whether Vermont would in a case involving a purely domestic agreement depart from its early cases, or whether a Vermont court would, when dealing with this particular agreement (or another like it) extend to respondent the same range of enforcement available in New York state. If the *York* case makes it pertinent to inquire as to precisely how a Vermont Court could be expected to honor the agreement to arbitrate, we submit that *Weiner et al. v. Prudential Ins. Co.*, 110 Vt. 22, at pages 26-27, and in cases cited, suggests that it would do so by staying the plaintiff's action pending determination of the issues in an arbitration proceeding.

In closing it is appropriate to take issue with petitioner in his claim (as we understand it to be) that *Erie v. Tompkins* is to be read as a restriction upon the power of Congress to legislate to the extent, at least, that a litigant in federal court must first show that he was entitled to analogous relief in a state court before he could invoke the federal arbitration act. As noted above, we contend here that the Court of Appeals correctly decided in this case that such was not the law. And we understand *Dice v. Akron & Youngstown R. Co.*, 342 U. S. 395 as saying that state procedures are irrelevant where the mode

of trial "is a goodly portion of the relief Congress has afforded." The claim that federal arbitration act is an excercise of valid congressional power is not, we feel, in conflict with the claim we also make that the rights conferred by an arbitration agreement, such as is here involved, is "substantive" within the meaning that it affords a rule of decision for cases in a federal court.

CONCLUSION

Respondent respectfully requests the Court to affirm the judgment of the Court of Appeals.